

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.536 OF 2004
IN
NOTICE OF MOTION NO.2060 OF 2004
IN
SUIT NO.794 OF 2004

Parvez Raisi

.. Appellant

v/s.

1. Mary S. Terron & ors.

.. Respondents

Dr. Virendra Tulzapurkar, senior counsel with
Mr.Sundee Parekh i/by Ms. J.P.Thakkar for
appellant.

Ms. Purnima Bhatia for respondent No.1.

Mr.S.Malik for respondent No.2.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 6th September, 2004

P.C.

Heard.

2. Dr.Virendra Tulzapurkar, the learned senior
counsel for the appellant (original defendant No.3)
raised two-fold contention. He contended that
though the defendant No.3 had raised the plea that
the court had no jurisdiction in the matter, the
learned motion Judge did not consider this aspect
which he ought to have before disposal of the
notice of motion. Secondly, the learned senior
counsel contended that the fixation of royalty at
the rate of Rs.5000/- per month is highly

excessive. He submitted that the defendant No.3 had paid a sum of Rs.17,50,000/- to defendant No.1 (son of the plaintiff) by way of consideration for being put in possession and that in the plaint the plaintiff has claimed mesne profits at the rate of Rs.1600/- per month only.

3. We are not persuaded by the submissions of the learned senior counsel. It is true that in the affidavit in reply in opposition to the notice of motion, the defendant No.3 raised the plea of want of jurisdiction of this court but we do not find that such plea was pressed before the learned motion Judge. The learned senior counsel submitted that since the notice of motion came up for ad-interim relief, there was no occasion for the defendant No.3 to press the plea of jurisdiction which could have only been raised at the time of final hearing of the notice of motion. Section 9A of the Code of Civil Procedure as inserted by way of Maharashtra State amendment provides for decision on the objection to jurisdiction as a preliminary issue before finally deciding the application relating to the interim relief. It does not preclude a party from objecting to the jurisdiction of the court at the time of consideration of prayer for the ad-interim relief. That the plea of want of jurisdiction was not pressed is not in doubt. In the memo of appeal

there is no such ground that the plea of want of jurisdiction was pressed. We find from the proceedings that by the order dated 2nd August, 2004, notice of motion was made returnable on 5th August, 2004. There was no impediment for the learned motion Judge in disposing of the notice of motion finally even if we assume that the motion came before the learned motion Judge for the ad-interim relief.

4. The first contention raised by the learned senior counsel is rejected.

5. As regards the second contention that fixation of the royalty at the rate of Rs.5000/- is excessive, suffice it to observe that admittedly the premises are about 500 sq.ft. at the Grant Road and the said premises are said to be used by the defendant No.3 for the purposes of Bar learned counsel for the respondent No.1 and in view thereof fixation of royalty at the rate of Rs.5000/- cannot be said to be excessive. In the plaint, the plaintiff has claimed mesne profits at the rate of Rs. 1600/- per month or such other sum as the court may deem fit against defendant No.3 and in this backdrop it is not correct to say that plaintiff has claimed mesne profits @ Rs.1600/- per month and the court could not have fixed royalty at the rate of Rs.5000/- per month.

6. The appeal is accordingly, dismissed in limine. However, it is clarified that in the event of the defendant No.3 raising the plea of want of jurisdiction in the written statement, obviously an issue will be struck in that regard and such issue would be decided in the suit.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)